Bankruptcy Court Mediation Programs: Ever Evolving, Improving, and Inspiring

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Bankruptcy courts across the country use mediation to encourage and facilitate settlement. It is readily apparent why mediation is so popular among both litigants and courts. Litigants like mediation because they can control the outcome of their dispute through a fast, confidential, and cost-effective process. And mediation is flexible, allowing the parties to creatively resolve the dispute and avoid the risk inherent in a "winner take all" court decision. Judges like mediation because they want to resolve issues and afford some relief to their over-extended court calendars. To facilitate the process, some courts have adopted elaborate mediation programs with well-documented procedures spelled out in their local rules. Other bankruptcy courts informally encourage mediation without the structure of published rules. While one size cannot fit all in designing a mediation program, this article explores some of the options for those courts considering formalizing their mediation programs or looking for creative ideas for expanding their mediation procedures. The following discussion will not include the mortgage modification a/k/a loss mitigation mediation programs that some courts have adopted to assist debtors in navigating HAMP and other residential mortgage modification programs. (For up-to-date information on those programs, see Judge Laurel Isicoff's (S.D. Fla.) article in the Summer 2013 Conference News).

Possibly the granddaddy of bankruptcy court mediation programs is the Alternative Dispute Resolution (ADR) program for the Central District of California. Virtually all controversies are eligible for the program. Judge Barry Russell is the ADR program administrator. According to Susan Doherty, the ADR program coordinator and Barry's career law clerk, adversary proceedings (particularly involving dischargeability issues) are the largest

percentage of matters assigned to mediation. The court maintains a panel of mediators, including attorneys and non-attorneys, who serve renewable three-year terms. The mediators agree to serve *pro bono* for one mediation session per calendar quarter. After their *pro bono* service, the mediator is eligible to be compensated. Susan Doherty reports that, with the exception of complex Chapter 11 mediations, the vast majority of the mediators opt to continue their *pro bono* service. Pro se debtors facing discharge litigation in particular will readily find a mediator for no charge. Recently, the Central District began exploring recruiting attorneys to represent pro se debtors for the limited purpose of participating in the mediation conference. Many unrepresented parties have trouble understanding that, at the mediation conference, the mediator does not represent them. If these efforts are successful, both the pro se debtor and the creditor would have counsel at the mediation conference.

The parties may consent to enter the Central District's program, or the judge may order them to do so, even over an objection. The parties normally agree on a mediator and alternate mediator, but the judge has the ability to choose one from the panel. Assignment of a case to the mediation program generally does not change time limits, deadlines, or other scheduling matters. Within 14 days after the mediator is appointed, the mediator and counsel will hold a telephonic scheduling conference. Then, within 30 days after the mediator is appointed, the mediation conference is held at a convenient neutral setting.

Seven days prior to the mediation conference, each party serves a written mediation conference statement. This confidential document is not filed with the court and provides the factual background, anticipated cost, proposed deadlines, and prior settlement history. The parties must attach copies of the documents from which the dispute has arisen or documents that would materially advance settlement. The parties may submit a separate mediation statement for

the mediator's eyes only. The court requires the parties and the mediator to sign a form confidentiality agreement. Under the agreement, written and oral communications, documents presented during the mediation conference, draft resolutions, and unsigned mediated agreements are confidential, although evidence otherwise discoverable is not excluded merely because it was presented in the mediation.

Unless excused by the mediator for cause, all counsel, individual parties, and representatives of entity-parties with authority to settle are required to attend the mediation conference. The mediation conference proceeds informally without testimony or applying evidentiary rules. The mediator helps the parties identify areas of agreement and generally, through separate consultation or otherwise, assists the parties in settling the dispute. At the conclusion of the conference, the mediator files a report. If the parties or their counsel fail to attend the mediation conference or otherwise violate the mediation procedures, the mediator may file a notice of non-compliance. The judge will then take remedial action. The judge accommodates parties who wish to place any resolution of a matter on the record during or following the mediation conference.

Another well-seasoned mediation program exists in the Southern District of New York. The program dates back to the nineties, but the judges periodically have updated it to meet the needs of the mega-case and to include the latest and greatest in ADR techniques, including "Early Neutral Evaluation." Either the court will order mediation, or the parties may stipulate to it. The court maintains a register of mediators, including non-attorney professionals, such as investment bankers, for cases requiring special expertise. The parties ordinarily will choose the mediator from the register, but if they cannot agree, the court will appoint one. Upon consultation with the parties, the mediator will fix a reasonable time and place for the mediation

session. The standing order provides that the conference must be set as soon after entry of the mediation order and as long in advance of the court's final evidentiary hearing as possible. The mediator's compensation is based on terms agreeable to the mediator and the parties and is subject to court approval if the estate is being charged. Detailed confidentiality rules apply.

In addition to the general order governing mediation in the Southern District of New York, the judges there frequently enter case management and scheduling orders encouraging settlement. Judge Marty Glenn's template requires counsel to meet face-to-face to discuss settlement and ADR within 14 days after the case management order is issued and again within 14 days after fact discovery is closed. While non-local counsel can seek leave to confer by telephone, Marty believes that in person meetings are much more productive in facilitating settlements. Marty also enters custom orders establishing procedures for large cases with multiple avoidance actions. In the *Borders* case, for example, he required mandatory mediation of all avoidance actions that had not been resolved within 30 days after the answer was filed. The parties could choose a mediator from a special seven-member *Borders* panel, choose another mediator, or, if they were unable to agree, Marty would appoint a mediator. The mediator's fee was split equally between the parties, and payment arrangements satisfactory to the mediator were required before the mediation began. It worked. Of the hundreds of preference avoidance claims, Marty did not conduct a single trial.

The Western District of Washington Bankruptcy Court instituted a formal mediation program in January 2012. Although voluntary, in every adversary proceeding, counsel must file a certificate indicating that he or she advised the client that the program exists. The certificate states: "Pursuant to Local Bankruptcy Rule 9040-3, each of the undersigned certifies that he or she has read the Honorable Thomas T. Glover Mediation Program Instructions for Parties,

discussed the available dispute resolution options provided by the Court, reviewed dispute resolution options offered by private entities, and considered whether this matter might benefit from any of them." The panel of mediators includes attorneys and non-attorneys, and the mediators must commit to conducting two *pro bono* mediations per year. The mediation program costs $500 per side for six hours of mediation-related services, of which four hours is expected to be in mediation with the parties. The fee may be waived at the mediator's discretion; a *pro bono* matter is one example of when the fee may be waived. The court's website features required forms (including the required confidentiality agreement) and detailed information. As with the Central District of California, dischargeability adversary proceedings are the most frequently mediated dispute. Initial results show a 70 percent success rate.

The Eastern District of North Carolina Bankruptcy Court's Local Rule 9019-2 allows the court to order mediation in any adversary proceeding or contested matter, but Judge Stephani Humrickhouse reports that the judges are unlikely to order mediation over a party's objection. Avoidance actions, claim objections, and lender liability adversary proceedings are good candidates for the court's mediation program. Detailed local rules govern the form of the mediated settlement order that the court enters. For example, the settlement conference must be held at the bankruptcy courthouse or other public or community building in the district. Unless the parties agree or are subject to a court order, the parties equally share the cost of the mediator. The court maintains a list of certified mediators on its website.

Judge Jim Haines reports that the District of Maine uses a "formalized informal" mediation program. Parties to an adversary proceeding must collaboratively fill out a pretrial scheduling form (available on the court's website) that inquires if they are interested in ADR. They have the option to proceed to an initial pretrial conference at which ADR will be discussed

and, sometimes, scheduled. Or they can bypass the initial pretrial conference by completely (and satisfactorily) completing the form. In any event, ADR will be covered at the final pretrial conference, which convenes at the close of discovery. Maine's program generally involves judicial mediation; with only two judges, Judge Louis Kornreich mediates Jim's cases and vice-versa. But the judge may refer the parties to a paid mediation service if the case warrants.

The Pennsylvania Bankruptcy Courts maintain dynamic ADR programs. Eastern Pennsylvania's mediation program has been in place since 1996; crucial to its success was the input of a local bar association committee. Local Rule 9019-3 provides that the court on its own motion or on a party's request may assign a matter to mediation. After consulting with the parties, the court appoints a mediator from the court's large register of certified mediators. At least three days before the mediation conference, the parties each must deliver a two-page mediation statement to the mediator and the other parties. The mediator volunteers the time expended to prepare for the mediation and up to four hours to conduct a mediation conference. After the four hours, the mediator may agree to continue to serve for free or give the parties the option to pay the mediator $150 per hour. Judge Rick Fehling credits the dedication of dozens of lawyers in volunteering their time to serve the program. The mediation is conducted within 30 days of the mediator's appointment, and the session is held at the courthouse unless the mediator chooses a different location.

In Western Pennsylvania, the court elected to provide mediation to comply with a congressional mandate requiring ADR and solicited lawyers and non-lawyers to serve as mediators for the court. Potential mediators complete a five-page application (available on the website). The parties to the litigation file a motion or stipulation asking the judge to appoint a mediator.

Judges Mary France and Bob Opel report that the Middle District of Pennsylvania's program is quite active. The standard scheduling order in adversary proceedings requires the parties to consider mediation through participation in the court-annexed mediation program and also provides an option of participating in a settlement conference with a bankruptcy judge not assigned to the matter.

Judge Ray Lyons relates that the District of New Jersey had an underutilized program for many years. About two years ago, then Chief Judge Judy Wizmur undertook to revitalize the program. A survey of the bar recommended that mediation should be required in all adversary proceedings. After much discussion, the judges agreed to adopt presumptive mediation with an opportunity to opt out. The court is revising its local rules, reconstituting the roster of mediators, and designing a required training program for the mediators. Stay tuned to njb.uscourts.gov to see the fruits of New Jersey's efforts.

The Northern District of California has a long-standing Bankruptcy Dispute Resolution Program (BDRP). Attorneys, accountants, and trustees volunteer to serve as mediators. A minimal fee of $100 from each party is required for the mediation. Although participation in the BDRP is not mandatory, plaintiffs are required to serve a BDRP information sheet with the summons. Judge Hannah Blumenstiel reports that the judges frequently recommend BDRP during status conferences. Between 2008 and 2012, over 200 cases were mediated. The overwhelming majority involved dischargeability actions. Detailed information can be found on the court's website.

In San Diego, Judge Louise Adler created a mediation program in the nineties, and Judge Margaret Mann confirms that it has served the Southern District of California well – with roughly half of the cases referred to the program settling. A unique feature of this program is

that the court maintains two panels of mediators: a volunteer panel and a compensated panel. The "compensated" panel is not exactly as it sounds, as the first half-day of the mediation session is conducted free of charge, and the fee is $200 per half-day thereafter. The court created a form questionnaire that must be completed and served on the mediator and other parties at least a week before the mediation conference. Additional local rules outline mediator qualifications for attorney and non-attorney applicants and describe the procedures for conducting mediation sessions. Attendance and court reporting requirements, as well as confidentiality, also are addressed.

The Eastern District of New York also has a local rule covering mediation and a formal program for *pro bono* mediation, including an option for the assignment of a "mediation advocate" for a pro se party. To apply for the *pro bono* mediation program or the assistance of a *pro bono* advocate (strictly limited to assisting the party at the mediation conference), a party must complete detailed forms and provide financial information showing that the party cannot afford to pay the mediator or an attorney. The other party has an opportunity to object to the assignment of the matter to the *pro bono* mediation program. Among the court's detailed rules for mediation are these initial ground rules: (A) Participate percent, (B) Comment Constructively and Specifically, (C) One Speaker at a Time, (D) Mutual Respect, (E) Attack the Problem, Not the Person, (F) Explore All Options Fully and Specifically, and (G) Keep an Open Mind.

Every court's program is described on its website, and many feature well-considered local rules or standing orders detailing the process, often accompanied by fillable forms. The Federal Judicial Center's Court to Court video program has produced two mediation segments, including one featuring the Delaware Bankruptcy Court. An ABI Subcommittee headed by Boston attorney Rick Mikels is wrapping up a set of model court rules for mediation, and

professional mediator Jack Esher has published and recently updated a Compendium of Bankruptcy Court Local Rules on ADR (available at www.mwi.org/compendium).

This non-exhaustive survey amply demonstrates that bankruptcy judges understandably are proud of their mediation programs. They have conquered thorny issues, including increasing participation by indigent and pro se parties and determining how to recruit and train talented mediators. When starting, formalizing, or expanding a mediation program, consider Eastern New York's advice: "Keep an Open Mind." After all, as professional mediator Joseph Grynbaum noted: "An ounce of mediation is worth a pound of arbitration and a ton of litigation!" That ounce of mediation just may go a long way in making the array of services that bankruptcy courts are able to offer to litigants even more expansive than they already are.